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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966

No. ~~1001~~ 45

BEN GENNARO,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on December 1, 1966.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix, infra) has not been reported as yet.

JURISDICTION.

The judgment of the Court of Appeals was entered December 1, 1966 (Appendix, infra). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

The question presented is whether, in the trial of a case involving violations of statutes imposing a tax on persons engaged in the business of accepting wagers, the District Court committed reversible error in failing to give the jury appellant's tendered instructions requiring a finding of a "proprietary interest in a bookmaking operation".

STATUTES INVOLVED.

26 U. S. C. 4411 provides:

"(a) **Requirement.**—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district. . . .

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) **Firm or Company.**—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) **Supplemental Information.**—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supple-

mental information from any person required to register under this section as may be needful to the enforcement of this chapter."

26 U. S. C. 7262 provides:

"Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000."

26 U. S. C. 7203 provides:

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor, and upon conviction thereof, shall be finded not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

STATEMENT OF THE CASE.

Petitioner appealed from a judgment of conviction entered on January 31, 1966, in the United States District Court for the Eastern District of Missouri, upon a verdict finding appellant guilty on two counts of a two count information of violating statutes imposing tax on persons engaged in business of accepting wagers.

The first count in the information charged:

"That during the taxable year July 1, 1964 through June 30, 1965, in the Eastern Division of the Eastern

District of Missouri, Ben Gennaro was willfully and knowingly engaged in the business of accepting wagers as a bookmaker, without having paid the occupational tax imposed by Section 4411, Title 26, United States Code. In violation of Section 7262, Title 26, United States Code."

The second count in the information charged:

"That during the taxable year July 1, 1965 through June 30, 1966, in the Eastern Division of the Eastern District of Missouri, Ben Gennaro was willfully and knowingly engaged in the business of accepting wagers as a bookmaker while willfully and knowingly failing to pay the occupational tax imposed by Section 4411, Title 26, United States Code. In violation of Section 7203, Title 26, United States Code."

On February 11, 1966, the Court sentenced appellant to pay a fine of $1,000 in Count 1 and sentenced him to imprisonment for a term of six months and a fine of $1,000 in Count 2.

The evidence on behalf of the Government was as follows:

The appellant operated Benny's Bar, 1028 Chouteau, in St. Louis, Missouri. On June 3, 1965, U. S. Treasury Agent, Jack Wallace, telephoned the bar and placed nine bets on horses with appellant. On June 4, 1965 he went to the bar and met Ben for the first time (T. 8 to 10), gave him $100.00 "as a deposit for future action" and met his partner Bob William (R. 12). While talking with Ben the telephone rang and appellant, during the course of an ensuing telephone conversation, wrote a name and some figures on a piece of paper (R. 13). Thereafter, over the next several weeks, Agent Wallace placed a number of bets over the telephone with Gennaro (R. 15 to 17). On July 12, 1965, he gave $105.00 to appellant

and again on July 17th he gave him $65.00 "for back bets and deposit (R. 18-19)." He also informed Ben that he was going out of town for awhile and would phone bets to him (R. 18). At that time Gennaro said he was going to be able to obtain parlay cards in the fall and that Agent Wallace could have a minimum order of 500 at five cents each (R. 19-20). Following this more bets were placed by telephone from Minneapolis and from Iowa (R. 21). At the time of the telephone call from Iowa, Agent Wallace asked Gennaro, "if he had purchased a $50.00 wagering tax stamp." Gennaro replied that "he hadn't; that the stamp was only $50.00, it was worth it to keep the 'Feds' off your back, but the minute you bought one, the State knew what was going on (R. 21-22)."

On October 4th, Agent Wallace met with appellant at a tavern and Gennaro invited Wallace to go into partnerships with him on parlay cards for $2500.00. He said the cards would be sent down from Chicago to East St. Louis, that another man would bring them to St. Louis, that 15 or 20 people would distribute them and they would "split the wins" (R. 24-26).

Following this more bets were placed on horse races and baseball games, the last bet being on October 20, 1965 (R. 29).

Special Agent Raymond S. Offutt testified that on November 12th he entered Benny's Bar with a search warrant, identified himself and asked the appellant if he had a Federal Gambling Stamp. Gennaro replied that he did not (R. 29-52). He placed appellant under arrest and confiscated a Football, Basketball and Hockey Schedule which Agent Offutt identified as a "line or result sheet" (R. 54), and a sheet containing a "summation of bets made by people" (R. 55), plus a "bet tab" taken from Gennaro's shirt pocket (R. 55).

Bernice McDonald testified that she is employed by the Internal Revenue and is familiar with the wagering tax stamp records and that after a careful search of the files she could find no record of a stamp being paid for by Ben Gennaro for the times involved (R. 61-65).

Defendant did not testify and no evidence was offered on his behalf. He did, however, submit certain instructions. The Court eliminated a portion of each, and gave the remainder.

Appellant's requested instructions 2 and 5 were as follows:

> "Instruction No. 2: The tax involved in this case is what is known as an 'occupational tax'. The term 'occupation' is synonymous with calling, trade, business or professions. 'Occupation' as commonly understood signified the business or activity in which a person engaged in order to secure a living or to obtain wealth.
>
> Instruction No. 5: Unless you find and believe from the evidence beyond a reasonable doubt that the defendant Ben Gennaro had a proprietary interest in the bookmaking operation and that he was engaged in bookmaking as an occupation you must find the defendant Gennaro not guilty on Counts I and II of the indictment."

The Court, after making certain changes in the above instructions, and over objection of appellant (R. 67), submitted them as follows (R. 91 and 92):

> "Defendant's Instruction No. 2: The tax involved in this case is what is known as 'occupational tax.' The term Occupation is synonymous with calling, trade, business or profession. 'Occupation' as commonly understood, signified the business or activity in which a person is engaged.

Defendant's Instruction No. 5: Unless you find and believe from the evidence beyond a reasonable doubt that the defendant Ben Gennaro was engaged in bookmaking as an occupation, you must find the defendant Gennaro Not Guilty on Counts One and Two of the Indictment."

REASONS FOR GRANTING THE WRIT.

The Court instructed the jury that "a 'Wagering Tax Stamp' must be obtained by making application therefor to the District Director of Internal Revenue and by payment of an occupational tax of $50.00. This is 26 U. S. Code, Sections 4411 and 6091 (R. 88)."

Section 4411 imposes a special tax of $50.00 per year on each person who is engaged in receiving wagers. This section of Title 26 is part of Subchapter B, entitled "Occupational Tax". And in an effort to clarify the term "occupation" appellant submitted instructions No. 2 and No. 5. By these instructions he was attempting to submit to the jury a proper standard by which to determine whether he was "engaged in the business of accepting bets" as contemplated by the statutes.

In construing the occupational tax provisions on persons engaged in the business of accepting wagers, the Supreme Court has held in United States v. Calamaro, 354 U. S. 351, 77 S. Ct. 1138, 1143, that only "writers", "bankers" or those who have a "proprietary interest" in a lottery operation are subject to the taxing statutes, and that therefore only those persons can be held for violation of their substantive provisions. The excise tax applies only to the one who is engaged in the business of accepting wagers as "a principal on his own account". The case holds that the language of the section limits the occupation tax to persons accepting wagers in a contractual sense and does not impose the tax on all the em-

ployees of a gambling enterprise, such as agents or runners.

Appellant's offered instructions wanted to distinguish the entrepreneur who is engaged in the business of accepting wagers from the one who is engaged in receiving wagers for such entrepreneur. Consequently, the appellant's instruction No. 5 asked the jury to find that he had a "proprietary interest in the bookmaking operation". His instruction No. 2 construed "occupation" in reference to the business or activity of securing a living, or a means of obtaining wealth as against accepting bets purely on a social or friendly basis wherein there is no profit.

The question presented, then, is whether in light of the Calamaro decision the District Court committed reversible error in failing to give the jury appellant's tendered instructions requiring a finding of a "proprietary interest in a bookmaking operation."

There can be no question that defendant was entitled to instructions on his theory of the case for which there was any foundation in the evidence, even though he did not present any testimony, and even though the evidence was weak, insufficient, inconsistent, or of doubtful credibility. Tatum v. U. S., 190 F. 2nd 612, 617; U. S. v. Indian Trailer Corp., 226 F. 2nd 595, 598; U. S. v. Phillips, 217 F. 2nd 435, 441.

However, with the deletions made by the Court, the proprietary interest theory of defense was not presented to the jury for their consideration and they were allowed to convict if they believed that the appellant was simply "engaged in bookmaking as an occupation" without any principal-agent distinction being made out.

That the Court of Appeals decided this question in conflict with the Calamaro decision is manifest in the opinion as follows:

"We find no merit to the claim that Calamaro supports an inference or conclusion that the existence of such a (proprietary) interest is an essential element of the offense."

The opinion does acknowledge, however, that Calamaro held:

"The fact remains, however, that Congress did not choose to subject all employees of gambling enterprises to the tax and reporting reqiurements, but was content to impose them on persons actually engaged in receiving wagers."

The question of whether a "proprietary interest" is an essential element of the offense required to be proven beyond a reasonable doubt and requiring the submission of a tendered instruction thereon, is one of importance in the administration of this section of the law. It is of special importance because the question has been decided by a Federal Appellate Court in a way probably in conflict with an applicable decision of the Supreme Court of the United States.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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